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No. 99-23

IN THE SUPREME COURT OF THE UNITED STATES

WAYNE C. LA VELLE,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,
STATE OF CALIFORNIA,
Respondent,

TRANS WORLD AIRLINES,
Real Party in Interest.

SUPPLEMENTAL BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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I. INTRODUCTION

Petitioner submits this supplemental brief to bring to the court's attention a recently rendered opinion by this court in Cleveland v. Policy Management Systems Corp. et al., No. 97-1008, 526 U.S. ___ (1999) (hereinafter "Cleveland"), decided May 24, 1999, which was not available to the Petitioner at the time he filed his Petition For Writ of Certiorari.

The Supreme Court of the United States has made a decision in Cleveland that directly impacts the case of LaVelle v. Workers' Compensation Appeals Board (TWA) (1998), which the Supreme Court of California refused to review and which is now before this court.

Cleveland was a disabled person who, after suffering a stroke and losing her job, sought and obtained Social Security Disability Income (SSDI) benefits from the Social Security Administration (SSA). She also sued her former employer under the Americans with Disabilities Act of 1990 (ADA), claiming that she was discriminated against when her employer fired her after she had requested job accommodations.

The Federal District Court did not evaluate Cleveland's reasonable accommodation claim on the merits. Instead the Court granted summary judgement to the defendant employer because it believed Cleveland's application for and receipt of SSDI benefits proved she was totally disabled from performing her job. The District Court concluded that because she was totally disabled, she was estopped from proving an essential element of her ADA claim: namely, that she could perform the essential functions of her job with at least reasonable accommodation.

The United States Supreme Court held in Cleveland that the pursuit and receipt of SSDI benefits does not automatically estop a recipient from pursuing an ADA claim, nor does it erect a

strong presumption against the recipient's success on an ADA claim. To survive her claim, however, Cleveland can not ignore her SSDI contention that she was too disabled to work. She must be ready to explain why her SSDI contention is consistent with her ADA claim that she can perform the essential functions of her job with at least reasonable accommodation.

Like Cleveland, Wayne LaVelle sought and obtained SSDI benefits from the SSA after suffering a disabling industrial injury. Like Cleveland, LaVelle was fired from his job after requesting job accommodation. Like Cleveland, LaVelle was estopped by a court from proving an essential element of his discrimination claim that he could perform the essential functions of his job with at least reasonable accommodation. But unlike Cleveland, who had filed her discrimination claim under the ADA, LaVelle filed his discrimination claim under the California Labor Code Section (CLCS) 132(a), alleging that his former employer, Trans World Airlines (TWA), discriminated against him by discharging him instead of providing him, as he had requested, with light duty job accommodation pending resolution of his injury.

II. THE CHRONOLOGY OF EVENTS IN LA VELLE'S CLAIMS UNDER THE SOCIAL SECURITY ACT AND THE CALIFORNIA LABOR CODE.

LaVelle's SSDI benefits claim and his CLCS 132(a) claim developed in the following way:

> *July 12, 1976*: LaVelle sustained an industrial injury to his psyche and internal organs at TWA. While he was servicing a plane, its chemical toilet contents fell on him.
>
> *October 6, 1976*: LaVelle filed an application for SSDI benefits.

October 20, 1976: LaVelle's medical condition improved. He attempted to return to work with the accommodation that he not work around chemicals as recommended by his physician, but TWA refused to make any accommodation (See Exh. #1 Lodge, p. L1).

December 13 & 14, 1976: The Workers' Compensation Appeals Board (WCAB) disability trial started, and LaVelle testified to the industrial injuries he had sustained.

December 22, 1976: SSA denied LaVelle's application for SSDI benefits.

December 23, 1976: LaVelle asked SSA to reconsider its 12/22/76 SSDI benefits denial. He said the TWA doctor would not let him return to work.

January 6, 1977: LaVelle's treating physician, internist Dr. Pappas, said petitioner could return to duty with accommodations (See Pet. Wrt. Cert., App. N, p. A42).

March 8, 1977: LaVelle returned to work with a medical request for light duty. TWA refused to accommodate him (See Exh. #2 Lodge, p. L7).

March 11, 1977: TWA discharged LaVelle and removed him from the seniority list (See Exh. #3 Lodge, p. L10).

April 29, 1977: TWA rescinded its discharge of LaVelle and restored him to the seniority list (See Exh. #4 Lodge, p. L12 and Exh. #5 Lodge, p. L14). His treating physician cleared him medically for light duty (See Exh. #6 Lodge, p.

L16), but TWA refused to accommodate him (See Exh. #5 Lodge, p. L14).

May 18, 1977: The first TWA investigational hearing was held pursuant to the Collective Bargaining Agreement (CBA) Article IV (a)(19) to determine whether LaVelle could perform his regular job without accommodation.

May 31, 1977: The WCAB disability trial last held on December 14, 1976 resumed.

June 10, 1977: The TWA investigational hearing last held on May 18, 1977 resumed and then ended.

August 9, 1977: LaVelle requested from TWA light duty and provided TWA with medical reports supporting his disability (See Pet. Wrt. Cert., App. G, p. A20).

August 15, 1977: TWA fired LaVelle (See Pet. Wrt. Cert., App. H, p. A22).

August 29, 1977: LaVelle filed a CLCS 132(a) claim contending TWA discriminated against him by terminating his employment instead of placing him on light duty pending the resolution of his injuries.

December 5 & 19, 1977: The WCAB disability trial last held on May 31, 1977 resumed.

January 9, 1978: The SSA awarded SSDI benefits to LaVelle retroactive to 7/14/76, which was the first day LaVelle was unable to return to work following his last industrial injury with TWA on 7/12/76. In awarding LaVelle SSDI benefits, the SSA administrative law judge credited the

testimony of Dr. Eisenberg given on 1/4/78 (See Exh. #7, Lodge, p. L18) and the medical report of Dr. Eisenberg dated 8/5/77 (See Pet. Wrt. Cert., App. K, p. A28 – A31), which had been submitted by LaVelle to TWA on 8/9/77 before his termination (See Pet. Wrt. Cert., App. G, p. A20).

July 17, 1978: The WCAB disability trial last held on December 19, 1977 resumed.

July 21, 1978: The WCAB disability trial ended.

April 8, 1996: The trial on LaVelle's CLCS 132(a) claim began.

September 25, 1996: LaVelle testified at trial on his CLCS 132(a) claim that on October 20, 1976 he had requested of TWA light duty such as picking up papers in the parking lot, but TWA had refused his request (See Exh. #8 Lodge, p. L23).

February 26, 1998: The trial on LaVelle's CLCS 132(a) claim ended.

July 31, 1998: The WCAB judge (hereinafter "Workers' Compensation Judge" or "WCJ") rendered his Findings and Order that TWA's termination of LaVelle did not constitute a violation of CLCS 132(a) (See Pet. Wrt. Cert., App. F, p. A17 – A19).

August 28, 1998: LaVelle filed a petition for reconsideration of the WCJ's Findings and Order dated July 31, 1998.

October 27, 1998: The WCAB issued its opinion and order denying LaVelle's petition for reconsideration (See Pet. Wrt. Cert., App. C, p. A4 – A7).

February 8, 1999: The California Court of Appeals in LaVelle v. WCAB (TWA) (1998) (hereinafter "LaVelle") denied LaVelle's petition for writ of review of the WCAB's opinion and order denying his petition for reconsideration (See Exh. #9 Lodge, p. L26).

March 24, 1999: The Supreme Court of California denied LaVelle's petition for review of the Court of Appeals denial of his petition for writ of review of the WCAB's opinion and order denying his petition for reconsideration (See Pet. Writ. Cert., App. A, p. A1).

III. THE CONFLICT BETWEEN CLEVELAND AND LA VELLE IN LIGHT OF BARNS

In its October 27, 1998 opinion and order denying LaVelle's petition for reconsideration, which the California Court of Appeals and the Supreme Court of California later refused to review, the California Workers' Compensation Appeals Board (WCAB) held:

> It is applicant's pursuit and receipt of continuing Social Security Benefits which support the finding that he was unable to work during the periods when he received such benefits. (Pet. Wrt. Cert., App. C, p. A6).

The above holding of the Board in LaVelle squarely conflicts with the decision of this court in Cleveland. In Barns v. Workers' Compensation Appeals Board, 266 Cal. Rptr. 503, 508 (Cal. App. 1 Dist. 1989) (hereinafter "Barns") (See Exh #10 Lodge, p. L28), the California Court of Appeals held that an instance of discrimination under a CLCS 132(a) claim occurs when an employer refuses to place an injured worker on light duty "pending the resolution of his

injury", absent a showing by the employer of any business necessity warranting its refusal to make the accommodation. As stated earlier in the above chronology of events in the development of his SSDI benefits claim and his CLCS 132(a) claim, LaVelle requested light duty, but the employer, TWA, refused his request. At no time in the record did TWA attempt to meet its statutory burden of justifying its refusal to make the accommodation on the basis of business necessity.

Finally, LaVelle showed he qualified under Barns to request light duty as he had not yet completely recovered from his injury. In other words, he requested light duty pursuant to Barns at a period of time when the resolution of his injury was pending (See Pet. Wrt. Cert., App. K, p. A28 – A31 at p. A31 where LaVelle's physician, Dr. Eisenberg, stated in his medical report dated August 5, 1977 that the patient is improving, can be rehabilitated, and requires further treatment for at least one but no more than two years. See also Pet. Wrt. Cert., App. G, p. A20 where LaVelle stated in his August 9, 1977 letter to TWA that he is submitting a copy of Dr. Eisenberg's report to TWA with his August 9th letter, which was subsequently received by TWA prior to its termination of his employment of August 15th).

IV. THE MISAPPLICATION OF JORDAN TO LA VELLE IN LIGHT OF CLEVELAND AND BARNS

In its October 27, 1998 opinion and order denying LaVelle's petition for reconsideration, which the California Court of Appeals and the Supreme Court of California later refused to review, the WCAB stated it agreed with the WCJ's report that LaVelle's CLCS 132(a) discrimination claim was premature under Jordan v. Workers' Compensation Appeals Board, 220 Cal. Rptr. 554 (Cal. App. 2 Dist. 1985) (hereinafter "Jordan"). In Jordan, the injured employee did not seek job accommodation, but rather sought an extension to her medical leave of absence for a period of time exceeding that which was allowed under the collective bargaining agreement (CBA). After her employer terminated her once she had

exhausted her maximum leave of absence permitted under the CBA, she brought a CLCS 132(a) claim against the employer. The California Court of Appeals ruled her claim was premature holding:

> If and when petitioner regains the ability to perform her regular job and seeks reinstatement, respondent's conduct at that time can be tested against section 132(a) and the precepts of *Judson*. (Emphasis added) (Jordan, 220 Cal. Rptr. at 556 or Pet. Wrt. Cert., App. L at p. A38).

In the case of LaVelle, however, he like Cleveland but unlike Jordan had requested and was subsequently denied job accommodation or light duty pending the resolution of his injury (see above-mentioned chronology of events). In light of the earlier described case of Barns (1989) – which mandates an employer to provide a period of light duty accommodation to a returning employee, absent any business necessity that would prevent an employer from doing so – the WCAB wrongly applied Jordan (1985) to LaVelle in 1998 by requiring him to be able to return to his regular job without restrictions before he could bring a CLCS 132(a) claim for a subsequent termination of employment.

Notwithstanding the above, Jordan supports LaVelle where it holds:

> It is neither realistic nor reasonable to require that an employer create a class of absentee employees, outside the ambit of the collective bargaining agreement, by keeping positions "open" for an indefinite period of time on the possibility that their former occupants may recover from an industrial injury (Emphasis added). *Id.*

LaVelle, unlike Jordan, was within the ambit of the CBA at the time of his discharge. Pursuant to Article 13 (b) (1) of the TWA-IAM CBA, medical leaves of absence could total up to five years (See Exh. #11 Lodge, p. L40 and Pet. Wrt. Cert., p.6). At the time of his discharge, LaVelle had used only one year of medical

leave from August 1976 to August 1977. Additionally, within the ambit of the CBA, LAX Maintenance Department Station Order 6.03 provided an injured employee with the option of limited work duty (See Pet. Wrt. Cert., App. M, p. A41). This option of limited work duty as provided by the station order has been addressed by a decision of the TWA-IAM System Board of Adjustment in the grievance of Marshall Story, whose factual situation was similar to that of LaVelle (See Exh. #12 Lodge , p. L 44).

IV. CONCLUSION

The holding in LaVelle by the California Workers' Compensation Appeals Board, which the California Court of Appeals and the Supreme Court of California refused to review, conflicts with the decision of this court in Cleveland. Cleveland and LaVelle both sought and obtained SSDI benefits from the SSA after each suffered a disabling injury. They were both eventually fired after their employers refused their requests for job accommodation. Thereafter, the courts estopped both of them from proving an essential element of their respective discrimination claims: namely, that each could perform the essential functions of his or her job with reasonable accommodation.

In light of this court's recent decision in Cleveland, the application and receipt of SSDI benefits no longer precludes an SSDI recipient from later making a claim of discrimination for wrongful termination of employment. The WCAB decision in LaVelle, however, requires disabled injured workers in California who are later discharged to make an untenable choice between either applying for immediate subsistence benefits under SSA or pursuing a discrimination claim under the California Labor Code. Consequently, under LaVelle if a disabled injured worker in California chooses to apply for SSDI benefits, he or she must forego an opportunity to be reinstated to a job with accommodation. The net effect of this choice by the worker, then, shields the employer from liability for alleged unlawful discrimination at the

expense of increased SSDI payments by the Federal Government to the disabled injured worker.

Given this court's recent decision in Cleveland and its impact upon LaVelle as explained herein, it is now more appropriate than ever that the petition for writ of certiorari filed by Wayne C. LaVelle be granted.

Respectfully submitted,

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